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In the

Supreme Court of the United States

OCTOBER TERM 1958

No. 363

DOVIE RAY BAKER, *et al.*,
Petitioners,

v.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Respondent.

BRIEF FOR RESPONDENT

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THE TEXAS AND PACIFIC RAILWAY COMPANY,
Respondent.

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

The questions presented in this case are:

(a) Whether Respondent owed decedent a non-delegable duty to perform the particular work through its own employees.

(b) 1. Whether there was any evidence, or sufficient evidence, to raise a jury issue as to whether Respondent's purpose and intent in entering into the contract with Nichols was to evade the provisions of the Federal Employers Liability Act;

2. Whether there was any evidence, or sufficient evidence, to raise a jury issue as to Nichols' occupying any status other than that of independent contractor; and

3. Petitioners' waiver of jury issues, if any were raised.

(c) Whether Congress intended to extend the benefits of the Federal Employers Liability Act to persons other than true employees of railroads.

STATEMENT OF MATERIAL FACTS

Claude Baker, an employee of W. H. Nichols & Co., was killed in an accident on Respondent's right-of-way on August 20, 1952. On August 25, 1952 his widow and minor children, Petitioners here, filed with the Industrial Accident Board of the State of Texas a Notice of Fatal Injury and a Claim for Compensation for Death, both of which documents specifically asserted that Baker had sustained his fatal injuries while employed by W. H. Nichols & Co. (R. 200, 201.) In due course, Petitioners accepted a settlement in the amount of SEVEN THOUSAND NINE HUNDRED NINETEEN AND 94/100 ($7,919.94) DOLLARS from Employers Mutual Liability Insurance Company of Wiscousin, Nichols' workmen's compensation insurance carrier. (R. 11.)

In this suit for Baker's death, Petitioners seek to bring their case within a more remunerative statute than the Texas Workmen's Compensation Laws, the Federal Em-

ployers Liability Act, and accordingly they maintain, as they must, that on the trial below evidence was adduced sufficient to raise a jury issue that Baker was an employee of Respondent when he met his death. Furthermore, they claim that, even though Baker was not an employee of Respondent, he should be regarded as one for purposes of the Federal Employers Liability Act. At no time during the six and one-half years from the date of the accident until the present have they considered either the evidence that Baker was Respondent's employee or the policy of the Federal Employers Liability Act to be so compelling that they must return the $7,919.94 obtained from the compensation carrier upon the representation that Baker was an employee of W. H. Nichols & Co. (R. 154.)

The case has been tried twice before a jury, and on each occasion the verdict was for Respondent. (R. 59, 26-42.) The judgment for Respondent rendered at the conclusion of the second trial was affirmed by the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas. (R. 204-220; *303 S. W. 2d 92*). Petitioners' request for a hearing before the Supreme Court of Texas was twice denied on the ground that the opinion of the Court of Civil Appeals contained no reversible error. (R. 235, 237.)

The work which Baker was performing at the time of the accident is called grouting and is a method of stabilizing and strengthening a railroad's roadbed with a mixture of sand, water and cement. (R. 64.) Grouting is classified as special or extraordinary maintenance. (R. 139, 192.) Inasmuch as it requires special equipment which Respond-

ent does not own and special knowledge which its employees do not have, Respondent has always had its grouting work done by an independent contractor. (R. 134, 135, 190.) This appears to be the custom of the railroad industry. (R. 135.)

The evidence is undisputed that Respondent had sent out detailed proposals to two contractors, and, on the basis of bids received from them, selected W. H. Nichols & Co., Baker's employer, to do the work. (R. 191.) Nichols had been in business at least since 1949 or 1950. (R. 82.) There is no evidence that it was in any way connected with Respondent (R. 134), or that any of its officers or employees worked for Respondent. The resulting contract, which is printed in pertinent part at (R. 204-206), provided that:

> "In the performance of the work or services herein provided, or any part thereof, Contractor shall occupy the status of an independent contractor, and shall not be subject to the detailed supervision of Carrier but shall be responsible to Carrier only for the final results in the accomplishment of such work or services."

The grouting was accomplishad by pumping the grout mixture into an area of the roadbed previously specified, within *general* limits, by Respondent's engineers. (R. 138, 194, 195.) The exact spot within the area where the mixture was pumped was within the discretion of Nichols, the contractor. (R. 138, 180-181.)

Respondent had on the job an inspector named Slaton, whose duty it was to see that the work did not interfere with the operation of trains (R. 179) and that it was in accordance with the terms of the contract. (R. 140.)

The statements in the following paragraph are based exclusively upon evidence elicited from Petitioners' witnesses, including Mrs. Baker. Baker, who had worked for Nichols on a previous occasion in 1950 (R. 148), but had since made his living as a tenant farmer, was re-hired by Nichols in March or April, 1952 (R. 148). He was hired by Nichols' foreman (R. 121). Nichols' foreman told the grouting crew when to go to work (R. 83, 110, 117, 122) and what to do (R. 83, 117, 122); when the mixing machine was to be moved (R. 83); and when to stop work to eat (R. 110, 117, 122); and when to quit work for the day. (R. 83, 117, 122.) The men were paid exclusively by Nichols. (R. 85, 110, 117, 121.) Nichols withheld their income tax. (R. 85, 110, 121.) Nichols deducted their social security. (R. 85, 110, 121.) The men regarded themselves as Nichols' employees (R. 85, 110, 117, 122) and Nichols' foreman as their boss (R. 83, 110, 117, 122). They did not consider that they were working for Respondent. (R. 86, 117, 122.) Baker's situation was no different from that of Nichols' other employees. (R. 117.) He told his wife that he was employed by Nichols. (R. 155.)

MISLEADING STATEMENTS OF FACT IN PETITIONERS' BRIEF

Regretably, there are a number of assertions in Petitioners' brief which do not accurately reflect the evidence. Some of these are conclusions reached by extracting certain phrases from their context. Others have no support in the evidence.

At p. 7 of Petitioners' brief, it is stated that Savage (Respondent's assistant chief engineer) "first agreed that grouting work is simply part of the regular maintenance of the track; later he called it a special type of maintenance."

The exchange to which Petitioners refer is quoted below. Respondent respectfully leaves it to this Honorable Court to determine whether Petitioners' statement is a fair one.

> "Q. [by Petitioners' counsel] Is grouting simply a part of the regular maintenance of the track?
>
> "A. Yes, I would say that it is; it is not regular maintenance work, but it is a special type of maintenance." (R. 139.)

A pp. 9-10 of Petitioners' brief, it is stated that

> "Respondent's assistant chief engineer admitted * * * that the contract could be cancelled by Respondent at any time."

See also pp. 24, 27 for substantially the same assertion.

The true facts are that Petitioners elicited no evidence as to how the contract could be terminated. In contending otherwise, Petitioners attempt to create the unique rule that evidence is adduced when counsel asks a question, the other side objects before the witness has completed his answer, and the objection is sustained. (See R. 194.)

At p. 23 of petitioners' brief, it is stated:

> "Admittedly, the work was a type of maintenance which normally is part of the regular business of Respondent."

This statement is directly contrary to the evidence. It is undiputed that Respondent itself has never done any grouting work. (R. 134.) Furthermore, Respondent's assistant chief engineer, who has been connected with railroading virtually all of his adult life (R. 131), testified that he knew of no other railroad which used its own employees for grouting. (R. 135.) This testimony was not contradicted by Petitioners.

At p. 27 of Petitioners' brief, in the course of Petitioners' attack on the Court of Civil Appeals, it is stated:

> "The opinion overlooks the testimony of Respondent's own witnesses that under the contract the area to be grouted was *purely* up to the railroad and that the contract could be cancelled at any time." (Emphasis supplied.)

The area to be grouted was not purely up to the railroad. Respondent specified general limits within which the grouting was to be done. (R. 138, 194, 195.) The selection of points at which the grout mixture was to be pumped into the roadbed was within the contractor's discretion. (R. 138.)

As has been previously noticed, it is not true that there was testimony that the contract could be cancelled at any time.

At p. 39 of Petitioners' brief, it is stated:

> "It is arguable that the *fact* that Nichols carried workmen's compensation insurance and other insurance, to meet the indemnity obligations imposed upon him by the contract with Respondent, is a *fact* indicating that Nichols was really an independent con-

> tractor. But the more plausible argument is that it is a *fact* from which the jury could have found that he was not." (Emphasis supplied.)

There is no such "fact" in the record. Indeed, there was no evidence adduced as to why Nichols carried workmen's compensation insurance. However, a plausible explanation may be found in Art. 8306, Sec. 1, Tex. Rev. Civ. Stat. (1925), which provides, with exceptions not applicable here, that any person with more than three employees who does not carry workmen's compensation may not raise the common law defenses of assumption of risk, contributory negligence, or the fellow servant rule, in suits against him by his employee for injuries incurred on the job.

There is no evidence of "other" insurance.

SUMMARY OF ARGUMENT

Petitioners' contention that in the trial court they were deprived of a jury trial is, when analyzed, nothing more than an argument as to the sufficiency of the evidence. There is no evidence that Nichols occupied any status other than that of independent contractor. The contract between Nichols and Respondent clearly established this relationship, not only by a specific provision in which Respondent relinquished the power to control the details of Nichols' performance, but also by provisions which made Nichols' fee subject to the quantity of work he performed and bound Nichols to indemnify Respondent fo losses incurred as a result of the work. That the contract was let on bids, that Nichols had been in business for years, that Nichols was

in no way connected with Respondent and that Nichols controlled the workmen doing the actual labor are other circumstances strongly indicating that Nichols was an independent contractor. It is very important to note that Petitioners collected, and have for more than 6 years retained, workmen's compensation benefits procured upon the representation that their decedent was Nichols' employee and under a Texas statute which is inapplicable to railroad employees.

The supervision exercised by Respondent's inspector, heavily relied upon by Petitioners as evidence that Respondent controlled the details of Nichols' work, represented nothing more than the observation which, according to well settled principles of law, an employer may maintain over an independent contractor.

Not only is there no evidence that grouting is part of Respondent's regular business, the record affirmatively shows that Respondent has always had its grouting done by independent contractors because it has never had the equipment or the personnel to handle this kind of work. Furthermore, it is undisputed that railroads customarily contract out their grouting work.

Petitioners have failed to show any evidence that the contract between Nichols and Respondent, by either its design or effect, violated Section 5 of the Federal Employers Liability Act. They point to no case which holds that grouting is a non-delegable duty on the part of Respondent. On the contrary, it appears to be established that even the

railroad's duties of ordinary maintenance are delegable in so far as employees of independent contractor are concerned. The inclusion of an indemnity provision does not invalidate the contract. Petitioners have failed to establish a causal connection between Nichols' indemnity obligations and the fact that he carried workmen's compensation insurance.

In any event, Petitioners had the burden of requesting that the trial court submit to the jury appropriate issues embodying their theories that the contract was an evasion of the Federal Employers Liability Act and that grouting is ordinary maintenance work, and by their failure to submit these issues they waived their right to a favorable jury finding.

There is no support in legal or legislative history for Petitioners' contention that the Federal Emloyers Liability Act was intended to apply to employees of independent contractors who are performing tasks pursuant to a contract with a railroad. In recent years Congress has liberalized the benefits available to persons already covered by the statute, but there is no authority to be found in the Act or in its amendments which would justify extending its benefits to persons other than actual employees of railroads.

ARGUMENT

POINT ONE

Under the facts and circumstances of this case, Petitioners were not denied a jury trial.

As their opening point, Petitioners state dramatically that, in the trial court, they were denied their constitutional right to trial by jury. What they are actually contending, of course, is that the evidence raised a fact issue as to whether Baker's employer, W. H. Nichols & Co., was actually an independent contractor.

Certainly there can be no question but that, if there was no evidence, or insufficient evidence to raise a jury issue, that Nichols was not an independent contractor, the court properly declined to present the matter to the jury. This is true whether the trial was in a state court or a federal court.

The Federal Rules of Civil Procedure specifically provide for instructed verdicts. 28 U. S. C. A. *Rule 50*. And this Honorable Court has held that the granting of an instructed verdict in a proper case does not deprive the losing party of the right of trial by a jury. *Berry v. U. S.*, 312 U. S. 450 (1941). Other federal cases hold that a motion for summary judgment, as provided for by the Federal Rules, 28 U. S. C. A. *Rule 56*, may be granted in a proper case without infringing the right of trial by jury. *U. S. v. Stangland*, 243 F. 2d 843 (9th Cir. 1957); *Whitsell v. Alexander*, 229 F. 2d 47 (9th Cir. 1956), *Cert. den.*, 351

U. S. 932 (1956). Moreover, the former Rule 73, governing practice in the District of Columbia and providing for summary judgments, was upheld by this Court in *Fidelity and Deposit Co. of Maryland v. U. S., 187 U. S. 315 (1902).*

Therefore, the inquiry before this Court is not whether Petitioners were denied a trial by jury but whether they introduced sufficient evidence to warrant submission of their case to the jury. Of course, if, as to a particular portion of their case, they introduced sufficient evidence but failed to request appropriate issues, they cannot now be heard to complain that the issues were not submitted. *Texas Rules of Civil Procedure, Rule 279.* To the same effect, see *28 U. S. C. A. Rule 51. Comins v. Schrivener, 214 F. 2d 810 (10th Cir. 1954).*

In order to bring their case within the Federal Employers Liability Act, Petitioners were required to show that their decedent, Baker, was an employee of Respondent. To accomplish this, they had the burden of introducing evidence sufficient to take to the jury the question whether Nichols, Baker's employer, was not an independent contractor, or to show that Nichols' contract with Respondent was void under Section 5 of the Federal Employers Liability Act *(45 U. S. C. A., Sec. 55), Miles v. Pennsylvania R. R. Co., 182 Fed. 2d 411 (7th Cir. 1950).* As to the former, they failed. As to the latter, they not only failed, they did not even request appropriate jury issues. Accordingly, they were in no way deprived of their constitutional rights in the trial court.

A. There was no evidence, or insufficient evidence, to establish that W. H. Nichols & Co. occupied any status other than that of independent contractor.

1. *Respondent did not retain the right to control the details of the work.*

In determining whether a person is an independent contractor or a servant the primary test is the power of the employer to control the details of the work. *Singer Mfg. Co. v. Rahn, 132 U. S. 518 (1889); Chicago, Rock Island & Pacific R. Co. v. Bond, 240 U. S. 449 (1916); Conasaugh River Lumber Co. v. Wade, 221 Fed. 2d 312 (6th Cir. 1955), Cert. den., 350 U. S. 949 (1956).* It is the power to control retained *by the agreement* which is decisive, not the overt exercise of that power. *National Labor Relations Board v. Steinberg, 182 Fed. 2d 850 (5th Cir. 1950); 1 Larson, Workmen's Compensation Law, Section 44.00 (1952); Restatement of the Law Agency 2nd, Sec. 220 (1958).* Accordingly, the contract between Nichols and Respondent (R. 205, 206), must be carefully examined.

Section 3 of the agreement between Respondent and Nichols shows conclusively that Nichols was to occupy the status of independent contractor and was not to be subject to Respondent's supervision of details. (R. 206.) In other words, Respondent specifically relinquished the power of control.

Other parts of the contract confirm the fact that the relationship created was that of independent contractor and employer.

Under Section 2, payment was to be made by quantity of work performed. (R. 205.) Although Petitioners suggest in their brief, p. 24, without citing authority, that this fact indicates that Nichols was not an independent contractor, the law is otherwise. *Chicago, Rock Island & Pacific R. v. Bond, supra; Anno. 20 A. L. R. 686, 756 (1922).*

That Respondent bound itself to transport Nichols' workmen to and from the job is "not material." *Wells Fargo & Co. v. Taylor, 254 U. S. 175 (1920).* See also *Jones v. New York Central Ry. Co., 182 Fed. 2d 326 (6th Cir. 1950), Cert. den., 340 U. S. 850 (1950).*

Contrary to Petitioners' unsupported assertions (p. 23), Section 1 of the contract providing that the work was to be performed "to the satisfaction" of Respondent's engineers does not alter Nichols' status as independent contractor. *Casement v. Brown, 148 U. S. 615 (1893).*

Section 4 of the contract, requiring Nichols to indemnify Respondent for losses incurred as result of the contract work, is another strong indication that Nichols was an independent contractor. *Chicago, Rock Island & Pacific R. Co. v. Bond, 240 U. S. 449 (1916); Anno. 20 A. L. R. 686, 788 (1922).*

The other tests to which the courts frequently resort in determining whether or not a relationship is that of employer-independent contractor are primarily useful in establishing who has the power of control. *Standard Oil Co. v. Anderson, 212 U. S. 215 (1909).* These indicia also support Respondent's contention that Nichols was an independent contractor.

For example, it is particularly important to establish whether or not the person employed is engaged in a distinct occupation or business. *Restatement, Agency,* **supra,** Section 220, (2) (b). The evidence is, of course, undisputed that Nichols had been in business for years. (R. 82.) It is also significant that there is no evidence that Respondent owned any stock in Nichols' corporation. (R. 134), *Del Vecchio v. Pennsylvania R. Co., 233 Fed. 2d 2, 4 (3rd Cir. 1956), Cert. den. 352 U. S. 909 (1956),* and that the contract was let on bids. (R. 191).

Petitioner insists that the contract in question was terminable at the will of Respondent and that this indicates Respondent had the power to control Nichols. In a proper case, the fact that the contract is terminable at will is indicative of an independent contractor-employer relationship. *Chicago, Rock Island & Pacific R. Co. v. Bond, 240 U. S. 449 (1916).* On the other hand, it is frequently said that the right to discharge at will is one of the powers the master has over his servant. *27 Am. Jur., p. 501 (Independent Contractors, Sec. 21) (1940).* Indeed, it is difficult to visualize an employer having effective "power to control" without having the right to fire his employee; and, as the court below correctly ruled, Respondent did not have that power over Nichols. Since the contract was made in Texas (R. 204) and was to be performed in Texas (R. 205), it must be construed according to Texas law, which is that, when a contract is for personal services, and does not require the imposing of a special confidence, and its duration is not specified, it is not terminable at the will

of either party. *Foster v. Wright, 217 S. W. 1091 (Tex. Civ. App. 1919);* and see *Hall v. Hall, 308 S. W. 2d 12 (Tex. Sup. Ct. 1958).*

Another very important element of the "right to control" is control of the workmen doing the actual labor. *Del Vecchio v. Pennsylvania R. Co., 233 F. 2d 2, 5 (3rd Cir. 1956), Cert. den., 352 U. S. 909 (1956).* The record in this case is, of course, replete with evidence that the workmen [a typical one of whom was Petitioners' decedent (R. 117)] were under the control of W. H. Nichols & Co. Nichols hired them (R. 121), instructed them in their duties (R. 83, 117, 122), told them when to come to work (R. 83, 110, 117, 122), when to eat (R. 110, 117, 122), and when to quit work (R. 110, 117, 122), paid them (R. 85, 110, 117, 121), deducted social security and withheld income tax (R. 85, 110, 121), and discharged them (R. 86, 129). The workmen naturally regarded themselves as employees of W. H. Nichols & Co. (R. 85, 110, 117, 122) and not of Respondent (R. 86, 117, 122).

Finally, it is very significant that Petitioners by their own actions appear to regard Baker as an employee not of Respondent, but of W. H. Nichols & Co. They filed a Notice of Fatal Injury and a Claim for Death Benefits* under the Workmen's Compensation Laws of the State of Texas, in which they represented that Baker was an employee of W. H. Nichols & Co. Upon the basis of these representations they were paid the sum of $7,919.94, which amount they

*These documents were properly received in evidence in the trial court as admissions against Petitioners' interest. *Texas General Indemnity Co. v. Scott, 152 Tex. 1, 253 S. W. 2d 651 (1952).*

have retained until this date. Surely, some six years after the accident (R. 3) and more than five years after they engaged an attorney (R. 59), they should be on notice that the Texas Workmen's Compensation Laws are inapplicable to employees of a steam railroad. *Article 8306, Sec. 2, Tex. Rev. Civ. Stat. (1925).*

2. *The supervision exercised by Respondent was not of that character requisite to transform Nichols from an independent contractor to a servant of Respondent.*

There is evidence that Respondent maintained an inspector (Slaton) on the job, whose duties were to see that the work performed (1) was in conformity with the terms of the contract, and (2) did not interfere with the normal operation of Respondent's trains. (R. 194, 195.)

It is well settled that an employer has the right to exercise such control over an independent contractor as is necessary to secure the performance of the work according to the terms of the contract. *Casement v. Brown, 148 U. S. 615 (1893); Jones v. Royal Indemnity Co., 206 Fed. 2d 561 (5th Cir. 1953).*

Respondent's engineers, under the terms of the contract, selected the general area to be grouted. (R. 195). The exact spot at which the grout mixture was to be pumped into the roadbed, within the selected area, was left to the discretion of Nichols. (R. 196.)

There is no evidence that Respondent's inspector, Slaton, did more than designate the general areas to be grouted, as distinguished from designating special locations within the general area. The testimony of Petitioners' witnesses in this respect is that Slaton would take a piece of chalk and mark the ties (R. 77, 103, 108, 115); that he would show the locations for inserting the points (R. 101, 120); and that he would tell the men to move to a new location after the grouting was finished. (R. 76, 108).

This testimony is entirely in conformity with and in no manner conflicts with testimony of Respondent's witnesses that the railroad selected and determined the area to be grouted (R. 138), and that Nichols' employees determined the particular spot within the designated area at which to insert the points.

In contending that their witnesses' testimony established that Slaton was interfering with the details of the work, Petitioners misconceive the process by which grouting is done. It is not a matter of pumping the mixture into isolated water pockets; the contractor is given an area to grout, and the mixture is pumped into that entire area. (R. 180.) The precise point, within the given area, at which the mixture is pumped into the embankment is within the contractor's discretion. Slaton's duty was only to inspect to insure that the grouting was done in the area specified by the contract, and his testimony, together with that of Petitioners' witnesses, reflects nothing more than that he performed this duty. (R. 180, 181.)

Petitioners' testimony that Slaton would direct Nichols' employees to move the grout points when the mixture bubbled out of the right-of-way (R. 111) and directed Nichols' employees as to the mixture of sand, cement and water (R. 76) constitutes nothing more than that character of inspection or surveillance which an owner is entitled to maintain to insure that the contractor performs the work in accordance with the contract. *Chicago, R. I. & P. R. Co. v. Bond, 240 U. S. 449, 455 (1916).* The mixture that Nichols and his employees were supposed to maintain was 16 parts of sand to 1 part of cement (R. 186). It was Slaton's duty to see that Nichols' employees did not change the ratio to 14 to 1, 13 to 1, or 10 to 1. (R. 187.)

Slaton's instructions to Nichols' employees as to the distance the machines must be placed from the tracks were to insure the safety of the railroad's operations and compliance with the Texas statute, Art. 6559(b), Tex. Rev. Civ. Stat. (1925), which prohibits the placing of materials closer than 8½ feet from the center of railroad tracks. Respondent's actions designed to protect the public do not militate against the conclusion that Nichols was an independent contractor. *Dougall v. Spokane, Portland & Seattle Ry. Co., 207 Fed. 2d 843 (1953), Cert. den., 347 U. S. 904 (1954).*

B. There was no evidence, or insufficient evidence, that the work contracted for was of a character usually and ordinarily performed by Respondent.

In their brief, petitioners rely heavily on the theory that the answer to the question "whose is the work being performed," will establish that Nichols was not actually an independent contractor. Although an examination of "whose is the work being performed" is quite useful where the issue is whether an employee of one matter has in fact been "borrowed" by another master, *Standard Oil Co. v. Anderson, 212 U. S. 215 (1909)*, its utility for determining the existence of an employer-independent contractor relationship is open to some question. Indeed, Petitioners' own special requested issue admits that an independent contractor is necessarily a person who is doing work for another (R. 57). The test was rejected for this purpose in *Dougall v. Spokane, Portland & Seattle Railway Co., 207 Fed. 2d 843 (9th Cir. 1953), Cert. den., 347 U. S. 904 (1954).*

It appears that what Petitioners are really trying to contend is that Nichols was performing work which is normally and naturally part of the regular course of Respondent's business and that, consequently, Nichols was merely Respondent's servant. The difficulty with this contention is that there is no evidence in the record to support it. Petitioners' claim that "admittedly the work was a type of maintenance work which normally is a part of the regular business of Respondent" is, as has been noted, demonstrably false. (See pp. 6-7 of this brief.)

In *Cimorelli v. New York Central R. Co., 148 Fed. 2d 575 (6th Cir. 1945); Pennsylvania R. Co. v. Roth, 163 Fed. 2d 161; Cert. den., 332 U. S. 830 (1947)*, and *Pennsylvania R. Co. v. Barlion, 172 Fed. 2d 710 (6th Cir. 1949)*, the evidence was that the contracts involved called for unloading and loading railroad cars,* work which, as the court in *Cimorelli* pointed out, was so interwoven with what was, under the circumstances, the railroad's business, that its performance could not be committed exclusively to the discretion of an independent contractor.

In contrast, there is undisputed evidence in this record that Respondent had always had its grouting done by independent contractors because it has never had the equipment or the personnel to handle this kind of work. (R. 134.) Moreover, Respondent's experienced assistant chief engineer, a man who has been employed by several railroads and has spent virtually all his adult life in railroad work (R. 131), testified that, to the best of his knowledge, no railroad ever does its own grouting work. (R. 135.) Petitioners did not attempt to contradict this testimony, and therefore failed to establish, even prima facie, that grouting is "railroad work." As a matter of fact, the evidence of record—that the work is customarily done by independent contractors, and the work is not part of Respondent's regular business—strongly indicates that Nichols was an independent contractor. *Restatement Agency 2d, supra*, Section 220 (c) and (h).

* As this Court observed in *U. S. v. Sola*, [illegible] employees.

C. There was no evidence, or insufficient evidence, that the intent of the contract between Nichols and Respondent was to evade the provisions of the Federal Employers Liability Act.

There is, of course, no evidence of any actual intent on the part of Respondent to evade the Federal Employers Liability Act. The record shows unequivocally that W. H. Nichols & Co. had been in business for years before the present contract was let. (R. 82.) There was no evidence that Respondent owned any stock in W. H. Nichols & Co. (R. 134), and Petitioners did not even attempt to establish that any of Nichols' officers or employees had ever had any connection with Respondent. The contract was given to Nichols simply because Nichols furnished the more acceptable of the bids received. (R. 191.) This case is, therefore, unlike *Erie R. Co. v. Marque, 23 Fed. 2d 664 (6th Cir. 1928)*, where there was evidence that the railroad had attempted to establish as an independent contractor an organization composed of its own former employees.

Actually, Petitioners do not contend that they have proved that Respondent had a subjective intent to evade the law, but they argue that the contract between Nichols and Respondent, by its operation, violates Section 5 of the Federal Employers Liability Act, because (1) Respondent was attempting to assign to Nichols a "non-delegable" duty and (2) Nichols was to indemnify Respondent from liability arising from the performance of the contract.

None of the authorities cited by Petitioners hold that grouting is among Respondent's non-delegable duties. *Erie*

R. R. Co. v. Marque, supra, without citing authority, expressed the opinion that a railroad has a non-delegable duty to the public and "perhaps" to its employees to maintain its roadbed in satisfactory condition. *Atlantic Coast Line R. R. Co. v. Treadway's Adminx., 120 Va. 735; 93 S. E. 560 (1917); Cert. den. 245 U. S. 670 (1918)*, simply held that a person who operated a signal light for the railroad was its employee. *Pederson v. Delaware, L. & W. Ry. Co., 229 U. S. 146 (1913)*, was concerned with whether under the Federal Employers Liability Act an employee of the railroad who was engaged in maintenance work on an interstate track was engaged in interstate commerce.

More nearly in point than petitioners' authorities are *Boyd v. Chicago & N. W. Ry. Co., 217 Ill. 332; 75 N. E. 496 (1905)*, *Orange v. Pitcairn, 280 Ill. App. 566 (1935)*, and *Klar v. Erie Ry. Co., 118 Ohio St. 612, 168 N. E. 793 (1928), App. dism. 279 U. S. 818 (1929)*, holding respectively, that construction, maintenance, and repair work may be delegated by a railroad.

Moreover, there is considerable recent direct authority that a railroad's duty to keep its transportation facilities in reasonable repair is not non-delegable in so far as employees of independent contractors are concerned. *Norman v. Spokane, Portland & Seattle Ry. Co., 101 Fed. Sup. 350 (1950), Affirmed 192 Fed. 2d 1020 (1951); Cert. den. 342 U. S. 945 (1952); Dougall v. Spokane, Portland & Seattle Ry. Co., 207 Fed. 2d 842 (1953), Cert. den. 347 U. S. 904 (1954); Tinsley v. Massman Construction Co., 270 S. W. 2d 835 (Mo. Sup. Ct. 1954).*

The presence of an indemnity provision in the contract between Nichols and Respondent does not make the contract void under Section 5 of the Federal Employers Liability Act. *Drago v. Central Ry. Co., 106 Atl. 803 (Ct. of Errors and Appeals of New Jersey, 1919); Cert. Den., 251 U. S. 553 (1919); Chicago & N. W. Ry. v. Davenport, 205 Fed. 2d 589 (5th Cir., 1953); Gaulden v. Southern Pacific Co., 78 Fed. Sup. 651 (D. C. N. D. Cal. S. D., 1948), Aff. 174 Fed. 2d 1022 (9th Cir., 1948).* Section 5 was intended to invalidate agreements between the railroad and its employees whereby the employees would relinquish their rights under the Federal Employers Liability Act for inadequate consideration. *Philadelphia B. & W. R. Co. v. Schubert, 224 U. S. 603 (1912).*

Agreements by independent contractors to indemnify railroads were expressly upheld by this Court in *Wells Fargo & Co. v. Taylor, 254 U. S. 175 (1920)*, and *Chicago, Rock Island & Pacific R. Co. v. Bond, 240 U. S. 449 (1916).*

Closely allied with Petitioners' second point is their contention that because Nichols carried workmen's compensation in order to meet his indemnity obligations under the contract the jury could have inferred that he was not actually an independent contractor. Petitioners' premise that Nichols carried workmen's compensation in order to meet indemnity obligations is, as has been demonstrated, wholly without support in the evidence. (See pp. 7-8 of this brief.) Consequently, his conclusion that this was part of a scheme to evade the force and effect of Federal Employers Liability Act must also fall. It should be pointed out, however, that

neither *Erie R. Co. v. Marque*, supra, nor *Cimorelli v. New York Central Ry. Co., 148 Fed. 2d 575 (6th Cir., 1945)*, is authority for his conclusion. In both of these cases the purported contractor was required by the railroad to carry workmen's compensation. The contract in this case contained no such provisions.

D. In any event, by failing to request the submission of appropriate issues to the jury Petitioners waived any rights they may have had to a favorable finding as to B and C above.

Even assuming that Petitioners have raised some question as to whether the contract between Nichols and Respondent had as its purpose and intent the evasion of the liability provisions of the Federal Employers Liability Act, they waived any benefit they may now derive from that evidence by failing to request appropriate instructions in the trial court. The intent of the parties to an agreement under attack as violative of Section 5 of the Federal Employers Liability Act is a question of fact for the jury. See *Brown v. Pennsylvania R. Co., 158 Fed. 2d 795 (2d Cir., 1947)*. Unless Petitioners could establish that their decedent was in fact employed by Respondent rather than by Nichols, it was incumbent upon them to prove that the contract between Nichols and Respondent was void under Section 5. *Miles v. Pennsylvania R. Co., 182 Fed. 2d 411 (7th Cir., 1950)*.

Similarly, Petitioners, having pleaded that Baker was engaged in the business of the railroad had the burden of

requesting acceptable fact issues as to whether grouting was work customarily performed by Respondent's employees.

Rule 279, Texas Rules of Civil Procedure, provides that upon appeal, all independent grounds of recovery not established conclusively under the evidence and upon which no issue is given or requested are deemed to have been waived. This rule is not unique. To the same effect is Rule 51 of the *Federal Rules of Civil Procedure, 28 U. S. C. A. Rule 51.* One complaining of the trial court's refusal to give a requested instruction must show that he submitted it to the Court. *Comins v. Scrivener, 214 Fed. 2d 810 (10th Cir. 1954).*

Petitioners' contention (p. 33 of their brief) that whether grouting was part of Respondent's regular maintenance work is not an ultimate issue ignores the fact that there was no evidence of customary railroad work to lend any weight to his requested issue of whether Baker was an employee of an independent contractor. It was incumbent upon Petitioners to present their theory to the jury. *Miles v. Pennsylvania R. Co.*, supra, at 415.

And, of course, it is manifest that it is "surely" not Respondent's burden to request this issue. Proof of an employment relationship between Baker and Respondent is an essential part—indeed, the *sine qua non* of Petitioners' case. *45 U. S. C. A., Sec. 51. North Carolina R. Co. v. Zachary, 232 U. S. 248 (1914).*

POINT TWO

It was not the intent of Congress to extend coverage under the Federal Employers Liability Act to persons other than railroad employees, the term "employees" being used in the usual and ordinary sense.

In urging their third point, Petitioners admit what they have been contending for 42 pages is untrue: that Baker's employer was "technically" an independent contractor. However, they suggest that the "broad purpose" of the Federal Employers Liability Act requires that Baker be classified as an employee of Respondent. Their version of legal and legislative history and intent is not only inaccurate, when applied to the present case it reaches grotesque results.

At the outset, it is scarcely to be believed that the "broad purpose" of Congress was to allow Petitioners to collect compensation benefits upon the representations that their decedent was an employee of a contractor and that they had a valid claim under a statute whose benefits are unavailable to railroad employees, and then to retain these benefits while contending that their decedent was not an employee of the contractor at all but was actually an employee of the railroad. As a great judge of this Court once observed in a related situation, "He may not litigate his claim for damages while clinging to the fruits of the contract which he elects to disaffirm." *Brassel v. Electric Welding Co., 239 N. Y. 78, 154 N. E. 745 (1924).*

The Federal Employers Liability Act was enacted because "Congress was dissatisfied with the common law duty of the master to his servant." *Rogers v. Missouri Pacific R. Co., 352 U. S. 500, 508 (1957).* In the 1939 Amendments to the Act (53 Stat. 1404), Congress overruled prior constructions of the earlier Act and insured that the defense of assumption of risk could not be interposed, *Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54 (1943),* and that the Act covered railroad employees who, although not actively engaged in actual transportation, furthered or substantially affected interstate commerce, *Reed v. Pennsylvania R. Co., 351 U. S. 500 (1956)* (clerical *employees of the railroad); Southern Pacific Company v. Gileo, 351 U. S. 534 (1956)* (employees in workshop *owned by railroad).* A decision of this Court that even persons so intimately connected with the railroad enterprise as Pullman porters were employees of an independent contractor had been on the books for nearly 25 years, *Robinson v. Baltimore & Ohio R. Co., 237 U. S. 84 (1915);* but, although the purpose of the 1939 Amendments was to overrule decisions which Congress thought unduly restrictive, *Rogers, supra,* at p. 509, Congress manifested no intent that the scope of the term "employees" be extended beyond its ordinary meaning.

Sinkler v. Missouri Pacific R. Co., 356 U. S. 328 (1958), simply held that a person who was admittedly an employee of the railroad could recover from the railroad for the negligence of the railroad's agent. The term "agent" was given an accommodating scope in order that the purposes

of the Federal Employers Liability Act might be achieved, i.e., to place the cost of injury to *railroad employees* on those most able to bear it. When Petitioners claim that *Sinkler* is applicable, they beg the question.

Rutherford Food Corp. v. McComb, 331 U. S. 722 (1947), and *Seas Shipping Co. v. Sieracki, 328 U. S. 85 (1945)*, both cited by Petitioners, are in no way comparable to the situation found in this case.

In *Rutherford*, boners of meat who worked exclusively in a slaughter house and whose work was merely one step in a process, the other steps of which were performed by persons who were admittedly employees of the slaughter house, were held to be employees of the slaughter house. There is no evidence that Nichols was performing work which was in any way related to work performed by Respondent's employees, and indeed there is ample evidence to the contrary. Nichols could more properly be compared to the truck drivers who were held to be independent contractors in *U. S. v. Silk, 331 U. S. 704 (1947)*, decided the same day as *Rutherford*.

The stevedores employed by stevedoring contractors were held in *Sieracki* to be among those to whom the shipowner owed his traditional obligation of seaworthiness. This was because they were doing "seamen's work", i.e., work which, historically, until recent times, was performed by members of the ship's crew. *328 U. S. at 96*. Petitioners point to no comparable "traditional obligation" on the part of railroads; and, though he makes many bald assertions that

grouting is "railroad work", the record is devoid of any evidence that grouting is historically or presently performed by employees of Respondent or any other railroad. Indeed, as we have seen, Respondent has always had its grouting done by independent contractors.

It was settled by this Court many years ago that, in the Federal Employers Liability Act, Congress:

> "used the word 'employee' and 'employed' * * * in their natural sense, and intended to describe the conventional relation of employer and employee. It was well known that there were on interstate trains persons engaged in various services for other masters. Congress, familiar with this situation, did not use any appropriate expression which could be taken to indicate a purpose to include such persons among those to whom the railroad company was to be liable under the Act." *Robinson v. Baltimore & Ohio Railroad Company, 237 U. S. 84, 94 (1915).*

See also *Hull v. Phila. & Reading Ry. Co., 252 U. S. 475, 479 (1920).* There is no evidence that Congress was any less "familiar with this situation" in 1939 when the Act was amended.

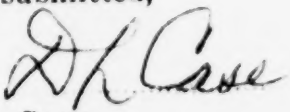
In the 50 years that the Federal Employers Liability Act has been the law, Congress has frequently liberalized its benefits, but it has never seen fit to extend the scope of the statute beyond railroading in its true sense. *Gaulden v. Southern Pacific Co., 78 Fed. Supp. 651 (D. C. N. D. Cal. S. D. 1948),* affirmed "for the reason stated in the opinion of the trial court." *174 Fed. 2d 1022 (9th Cir. 1948).* The purposes of that Act in no way compel an interpretation of the evidence in this case in favor of an employment rela-

tionship, particularly when the persons contending for that interpretation have accepted, and six years later still retain, benefits procured upon their word that the relationship did not exist.

CONCLUSION

For the reasons herein demonstrated, it is respectfully submitted that the judgment of the Court of Civil Appeals should be in all things affirmed, or, in the alternative, that certiorari should be dismissed.

Respectfully submitted,



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APPENDIX

FEDERAL EMPLOYERS LIABILITY ACT, 35 Stat. 65, 66, 53 Stat. 1404, 45 U.S.C., Secs. 51 and 55

Section 51. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Section 55. Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

Revised Civil Statutes of Texas, 1925, Art. 8306, Sec. 1—

Damages and compensation for personal injuries

In an action to recover damages for personal injuries sustained by an employe in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense:

1. That the employe was guilty of contributory negligence.

2. That the injury was caused by the negligence of a fellow employe.

3. That the employe had assumed the risk of the injury incident to his employment; but such employer may defend in such action on the ground that the injury was caused by the willful intention of the employe to bring about the in-

jury, or was so caused while the employe was in a state of intoxication.

4. In all such actions against an employer who is not a subscriber, as defined hereafter in this law, it shall be necessary to a recovery for the plaintiff to prove negligence of such employer or some agent or servant of such employer acting within the general scope of his employment.

Revised Civil Statutes of the State of Texas 1925. Art. 8306, Sec. 2. Application of law; exceptions

Sec. 2. The provisions of this law shall not apply to actions to recover damages for personal injuries nor for death resulting from personal injuries sustained by domestic servants, farm laborers, ranch laborers, nor to employes of any firm, person or corporation having in his or their employ less than three employes, nor to the employes of any person, firm or corporation operating any steam, electric, street, or interurban railway as a common carrier. Any employer of three or more employes at the time of becoming a subscriber shall remain a subscriber subject to all of the rights, liabilities, duties and exemptions of such, notwithstanding after having become a subscriber the number of employes may at times be less than three.

Revised Civil Statutes of Texas, 1925, Art. 6559b. Structures near tracks

All loading platforms and all houses and structures, and all fences, and all lumber, wood and other materials hereafter built, placed or stored along the railroads of this State, either on or near the right of way of the main lines,

or on or near any spur, switch or siding of any such railroad, shall be so built, constructed, or placed that there shall be not less than eight and one-half (8½) feet space from the center of such main line, spur, switch or siding to the nearest edge of the platform, or to the wall of the building, or to the lumber, wood, or other material.

Federal Rules of Civil Procedure Rule 50. Motion for a Directed Verdict

(a) When Made: Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.

(b) Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move t have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury had been

discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Federal Rules of Civil Procedure Rule 51. Instructions to Jury: Objection

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Texas Rules of Civil Procedure. Rule 279. Submission of Issues

When the court submits a case upon special issues, he shall submit the controlling issues made by the written pleadings and the evidence, and, except in trespass to try title, statutory partition proceedings and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to an affirmative submission of any issue in his behalf where such issue is raised only by a general denial and not by an affirmative written pleading on his part. Nothing herein shall change the burden of proof from what it would have been under a general denial. Where the court has fairly submitted the controlling issues raised by such pleading and the evidence, the case shall not be reversed because of the failure to submit other and various phases or different shades of the same issue. Failure to submit an issue shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the issue is one relied upon by the opposing party. Failure to submit a definition or explanatory instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or explanatory instruction has been requested in writing and tendered by the party complaining of the judgment.

Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived; but where such ground of recovery or of defense consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery or of defense, and necessarily referable thereto, are submitted to and answered by the jury, and one or more of such issues are omitted, without such request, or objection and there is evidence to support a finding thereon, the trial court, at the request of either part, may after notice and hearing at any time before the judgment is rendered, make and file written findings on such omitted issue or issues in support of the judgment, but if no such written findings are made, such omitted issue or issues shall be deemed as found by the court in such manner as to support the judgment. A claim that the evidence was insufficient to warrant the submission of any issue may be made for the first time after verdict, regardless of whether the submission of such issue was requested by the complaining party. Amended by Order of March 31, 1941.

Public Laws-CH. 685-Aug. 11, 1939, 53 Stat. 1404, (Chapter 685)

AN ACT

To amend the Employers' Liability Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 1 and 4 of the Act entitled "An Act relat-

ing to the liability of common carriers by railroad to their employees in certain cases", approved April 22, 1908 (35 Stat. 65; U. S. C., title 45, secs. 51 and 54), be, and they are hereby, amended to read as follows:

"Sec. 1. That every common carrier by railroad while engaging in commerce between any of the several States and Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee, shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be

considered as entitled to the benefits of this Act and of an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases' (approved April 22, 1908), as the same has been or may hereafter be amended."

"Sec. 4. That in any action brought against any common carriers under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Sec. 2. That the first sentence of section 6, of the Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April 22, 1908 (35 Stat. 65; U. S. C., title 45, sec. 56), be, and it is hereby, amended to read as follows:

"Sec. 6. That no action shall be maintained under this Act unless commenced within three years from the day the cause of action accrued."

Sec. 3. That the Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April 22, 1908, as amended

(U. S. C., title 45, ch. 2), be, and it is hereby, amended by adding an additional section thereto as follows:

"Sec. 10. Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest shall, upon conviction thereof, be punished by a fine of no more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: Provided, That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

"If any provision of this Act is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and the applicability of such provision to other persons and circumstances shall not be affected thereby.

Approved, August 11, 1939.